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# ECONOMIC, SOCIAL AND CULTURAL RIGHTS

## Intellectual property rights and human rights

## Report of the Secretary-General

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## Introduction

In its resolution 2000/7, the Sub-Commission for the Promotion and Protection of Human Rights requested the Secretary-General to submit a report on the question of intellectual property rights (IPRs) and human rights at its fifty-third session. To this end, a note verbale was sent to States, and letters were sent to international organizations and non-governmental organizations dated 6 March 2001, requesting information that would be relevant to the report. As of 29 May 2001, replies had been received from Brazil, Pakistan, the United Nations Conference on Trade and Development, the World Trade Organization, the Center for International Environmental Law, the European Writers' Congress, Greenpeace, the German Peace and Justice Commission, the International Association of Audio-Visual Writers, the International Federation of Musicians, the International Publishers Association and the Max Planck Institute. The responses are included below. Given their length and the page limitation of reports to the Sub-Commission, most of the responses appear in summary form. The originals (in English, unless otherwise noted) are available at the Office of the High Commissioner for Human Rights for consultation.

## I. REPLIES RECEIVED FROM GOVERNMENTS

### A. Brazil

The comments from the Government of Brazil have been included in the report of the High Commissioner on the impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) on human rights, which is available to the Sub-Commission as document E/CN.4/Sub.2/2001/13. The report of the High Commissioner relates specifically to the right to health. As the comments of Brazil focused entirely on the promotion and protection of the right to health, they were incorporated there rather than in the present report.

### B. Pakistan

1. The Government of Pakistan replied that in recent years, the international intellectual property regime has been considerably strengthened, most notably through the adoption of the TRIPS Agreement.

2. The avowed objectives in strengthening the intellectual property rights system were that it would lead to enhanced innovation, foreign investment, research and development and, indeed, transfer of technology. As stated in article 7 of the TRIPS Agreement, "the protection and enforcement of intellectual property rights should contribute to the promotion and enforcement of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations".

3. The experience of many developing countries with the implementation of the intellectual property agreements indicates that the fundamental objectives of these agreements are not being realized. There may perhaps be reasons to believe, at best on theoretical grounds, that in the long term, benefits could accrue in the form of increased investment, innovation and transfer of technology. However, it is painfully evident that in the short and medium term, the costs being

borne by the developing countries are higher than the gains, and that the balance between the rights holder (mostly from the developed countries) and the user of intellectual property has shifted dramatically in favour of the former. This is borne out by the following facts:

(a) There are immediate and fairly significant costs of implementing the intellectual property agreements by developing countries. These include the establishment of judicial, administrative and enforcement frameworks including the setting up of customs and border enforcement machinery;

(b) The implementation of stronger intellectual property laws is giving rise to a situation where there is a consistent increase in the prices of pharmaceutical products, software and textbooks. These products are essential to furthering the right to health, the right to education and the right to food;

(c) There are increasing constraints on acquiring technology. Patent holders can demand higher prices for transferring products and attach more onerous conditions for the use of the licence. Also, increasing the breadth and scope of patents often restricts research in areas covered by patents, most significantly in newer technology such as biotechnology;

(d) There is a lack of protection for traditional knowledge in areas where developing countries have significant assets. The increased patenting of plant varieties or of products produced from genetic resources available in the developing countries without payment of fees/royalties to local communities, whose knowledge is used in such research, is a source of concern;

(e) Stronger intellectual property rights often lead to monopolistic and anti-competitive behaviour by the rights holder with predictably negative effects on prices of products and access to technology;

(f) Higher standards for invoking restrictions on resorting to parallel imports leads to lack of flexibility for developing countries to respond and to promote genuine national interests, particularly in the areas of education and health, as was vividly evident in the recent inability of some countries to respond quickly to the emergency created by the HIV/AIDS epidemic.

4. In this context, there is a need to undertake a comprehensive review of the international intellectual property regime. The review should seek to:

(a) Restore the balance between the rights of the intellectual property holders and those of users;

(b) Ensure that the fundamental objectives of the intellectual property agreement, namely the promotion of innovation, dissemination of technology and investment, are facilitated and not hindered by the intellectual property regime;

(c) Review the intellectual property agreement with a view to introducing provisions which contribute to the development of the developing countries;

(d) Ensure that the implementation of the intellectual property agreement is not in conflict with the relevant provision of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.

## II. REPLIES RECEIVED FROM INTERNATIONAL ORGANIZATIONS

### A. United Nations Conference on Trade and Development

1. The response from UNCTAD referred to three aspects of the work of the organization relevant to protection of intellectual property (IP) - a study on the TRIPS Agreement and its development dimension, competition law and policy, and traditional knowledge.

2. In 1996, the UNCTAD secretariat prepared a report, The TRIPS Agreement and Developing Countries (UNCTAD/ITE/1). The report noted that the TRIPS Agreement represents a significant change in international standards for protecting intellectual property. Its implementation is likely to engineer fundamental changes in industrial structure, market competition and growth in many countries.

3. The main thrust of the study was that developing countries should be aware of the economic and other implications of the Agreement so that they would be able to structure their IP systems, including the implementation of the TRIPS Agreement, in a way that enhances dynamic competition and is consistent with their development objectives. Ultimately, therefore, the purpose of the study was to increase the understanding of the TRIPS Agreement in developing countries, particularly the least developed countries, and support the efforts of those countries in the formulation of strategies and the establishment of arrangements conducive to the implementation of the TRIPS Agreement.

4. Three key points arise from the report. First, the TRIPS Agreement requires substantially strengthened protection and enforcement of intellectual property rights (IPRs) in many countries, phased in over varying time periods. The strengthening of the IP regime is expected to engender positive impacts in developing countries, including more local innovation and additional inward foreign direct investment and technology transfer. However, it could also precipitate certain negative impacts, including higher prices for protected technology and products and restricted abilities to achieve diffusion through product imitation or copying. Second, in implementing the TRIPS Agreement, developing countries should aspire to strike and sustain a balance between the needs of innovative firms and their licensees for protection and easy appropriation of their intellectual property on the one hand, and the needs of legitimate follow-on competitors and consumers, on the other. Thus in accommodating their economic development goals to the TRIPS requirements, developing countries should maintain an appropriate balance between incentives to innovate and the need for adequate diffusion of technical knowledge into their economies. Third, the impact of the various disciplines of IPRs covered in the TRIPS Agreement will differ among countries depending, inter alia, on the existing IP system, the level of economic and technological development, and the mode of implementation.

5. A number of developing countries, mainly in Asia and Latin America, began the process of changing their legal regimes for intellectual property and supporting institutions in the late 1980s and early 1990s. In some countries, TRIPS will thus impose little in the way of new

obligations as countries had already initiated reforms consistent with TRIPS. For others, TRIPS requires substantial changes in norms of protection. In practice, any particular country's approach to compliance with TRIPS will depend on its own innovation strategy and technology development policies. Therefore, there remains scope for implementing the Agreement in a manner conducive to promoting dynamic competition within their own economies, allowing for appropriate legal incentives for information diffusion and local innovation. This approach would require:

(a) Establishing intellectual property right laws that are consistent with TRIPS but do not significantly disadvantage follow-on inventors and creators;

(b) Instituting incentive structures that will help stimulate innovation at the local level;

(c) Taking greater advantage of access to scientific and technical information that resides within the global information infrastructure;

(d) Applying coherent competition policies to curb the adverse effects of the abusive use of IPRs; and

(e) Improving the innovation system through broader programmes of intellectual skill acquisition and improvement of capacities to absorb new technical information.

6. The UNCTAD submission also refers to its work in the area of competition law and policy, which dates back to the early 1970s and which led to the adoption by the General Assembly (resolution 35/63) in 1980 of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, in the form of a recommendation to States (the Set).

7. The UNCTAD secretariat prepared a report on competition policy and the exercise of intellectual property rights (TD/RBP/CONF.5/6) as part of the documentation for the Fourth United Nations Conference to Review All Aspects of the Set in September 2000. The Conference adopted a comprehensive resolution reaffirming the validity of the Set, calling for its implementation by States and setting down the future work of UNCTAD in this area.

8. Finally, the submission from UNCTAD referred to traditional knowledge. At UNCTAD-X, UNCTAD's member States decided to address the protection of traditional knowledge as part of UNCTAD's work in the area of trade, environment and development. In response to this mandate, UNCTAD convened in October 2000, an expert meeting on "Systems and national experiences for the protection of traditional knowledge, innovations and practices". The outcome of the meeting included recommendations.

9. In February and March 2001, the UNCTAD Commission on Trade in Goods and Services, and Commodities considered the recommendations of the meeting. The Commission made agreed recommendations to Governments, the international community and UNCTAD. It encouraged Governments, in cooperation with local and indigenous communities, to raise awareness of the role and value of traditional knowledge (TK), support the innovation potential

of local and indigenous communities, promote, where appropriate, the commercialization of TK based products and services with an emphasis on equitable benefit sharing with TK holders, and implement national legislation for the protection of TK. At the international level, the Commission recognized that the production of TK has many aspects and is being addressed in several forums, including the Convention on Biological Diversity, the World Intellectual Property Organization and the World Trade Organization. It stressed the need for continued coordination and cooperation between communities, further exchange of information on national systems to protect TK, and exploration of minimum standards for an internationally recognized sui generis system for TK protection. The Commission also made specific recommendations for UNCTAD, in particular to support coexisting work of WIPO, the World Health Organization and the United Nations Environment Programme.

## B. World Trade Organization

1. The response of WTO examines human rights of individuals and public interest as traditional foundations of intellectual property protection, and looks at how they are reflected in the present multilateral intellectual property law, in particular in the TRIPS Agreement.

2. Human rights and the equitable treatment of authors and inventors, on the one hand, and public interest, on the other hand, remain the underpinnings of IP systems. While the civil law tradition might sometimes emphasize more the first approach and the common law tradition over the second approach, it would appear that these two conceptual starting-points are complementary rather than mutually exclusive. It should also be noted that the social objectives vary between different areas of IP: while modern copyright and patent laws have been designed to encourage creative work and technological innovation and provide means to finance research and development, the focus of trademark laws is more on consumer protection and in ensuring fair competition among traders.

3. The economic importance of intellectual property has grown in recent decades with the increasing role of information- and knowledge-based industries. With the increasing interdependence of national economies, it became clear that there no longer existed a functioning multilateral rule of law in this area to regulate relations and differences between countries. This led to the inclusion of IP matters in the Uruguay Round negotiations, launched in 1986, and the conclusion of the TRIPS Agreement as part of a package of agreements that make up the WTO Agreement.

4. The objectives of the TRIPS Agreement, set out in article 7, put emphasis on the public interest rationale of intellectual property protection. This article, entitled "Objectives", says that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations". This corresponds with the objectives of article 15 (1) (a) and 15 (1) (b) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognize the right of everyone to take part in cultural life and to enjoy the benefits of scientific progress and its applications. It can be

argued that the TRIPS Agreement also seeks to give effect at the multilateral level to article 15 (1) (c), which establishes everyone's "right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

5. It should be added that the TRIPS Agreement also promotes other values deemed essential for the realization of human rights. For example, the TRIPS Agreement prohibits discrimination on the basis of nationality in the area of IPRs; this is supportive of the non-discrimination principles contained in the human rights instruments. The Agreement promotes the rule of law at the national level; it requires, inter alia, the observance of due process by requiring that judicial procedures are fair and equitable, decisions are in writing and reasoned, and that parties have an opportunity to appeal. The Agreement provides for international cooperation to fight copyright piracy and trademark counterfeiting, which often have links to organized crime. The TRIPS Agreement also promotes the rule of law at the multilateral level by commonly agreed rules and peaceful settlement of disputes through a multilateral system.

6. An objective of intellectual property protection is to promote long-term public interest by means of providing exclusive rights to right holders for a limited duration of time. After the expiration of the term of protection, protected works and inventions fall into the public domain and anyone is free to use them without prior authorization by the right holder. Hence, in the long term there is no conflict but rather a mutually supportive relation between the interests of promoting creativity and innovation and maximizing access. However, during the course of the term of protection, there is potential for conflict between these two considerations, which can also mirror differences between the interest of right holders and users. The challenge of the national and international rule-maker is to find the optimal balance between various competing interests with a view to maximizing the public good, while also meeting the human rights of authors and inventors. Article 7 of the TRIPS Agreement emphasizes the need for balance.

7. An optimal balance within IP systems at the national and multilateral level can be reached by properly determining the definition of protectable subject matter, the scope of rights, permissible limitations and the term of protection. This balance is constantly developing, both at the national and international level, in response to economic and technological as well as political developments. The TRIPS Agreement is a minimum rights agreement that leaves a fair amount of leeway to member countries to implement its provisions within their own legal system and practice and fine-tune the balance in light of domestic public policy considerations.

8. Rights under article 27 (2) of the Universal Declaration and article 15 (1) (c) of ICESCR, together with other human rights, will be best served, taking into account their interdependent nature, by reaching an optimal balance within the IP system and by other related policy responses. Human rights can be used - and have been and are currently being used - to argue in favour of balancing the system either upwards or downwards by means of adjusting the existing rights or by creating new rights. Which way best serves the objectives of human rights is, at the end of the day, a matter of social and economic analysis and empirical evidence.

9. The issue of patent protection for pharmaceutical products is one where the problem of finding a proper balance is particularly acute. On the one hand, it is especially important from a social and public health point of view that new drugs and vaccines to treat and prevent diseases

are generated and the incentives provided by the patent system are particularly important in this regard. On the other hand, precisely because of the social value of the drugs so generated, there is strong pressure for such drugs to be as accessible as possible as quickly as possible.

10. The TRIPS Agreement represents an effort to find an appropriate balance between these considerations. On the one hand, the Agreement requires that, after the end of the relevant transition period, patent protection for pharmaceutical products should be available for a 20-year term of protection. On the other hand, the Agreement contains a substantial number of provisions which enable Governments to implement their intellectual property regimes in a manner which takes account of immediate as well as longer-term public health considerations. These provisions include those relating to certain exemptions from patentability, the possibility to make limited exceptions to exclusive rights, compulsory licensing, parallel importation, and the recognition that member countries may adopt measures necessary to protect public health and nutrition.

11. The issue of protection of traditional knowledge is currently being discussed by the international community, including the TRIPS Council. One of the concerns that has been expressed relates to the patenting by foreigners of traditional knowledge. Under the principles contained in the TRIPS Agreement, this should not be possible. For something to be patentable under the TRIPS Agreement, it has to be an invention which includes meeting tests of novelty and inventive step, that is to say it must not be part of what patent officials refer to as "the prior art". Traditional knowledge generally would not meet these tests. There have been cases where, improperly, patents have been granted for knowledge which turns out not to be new. In such cases, patents can be, and have been, invalidated.

12. One of the practical problems that gives rise to such improper grants of patents is that much traditional knowledge is not recorded in databases that can be consulted by patent examiners when they decide whether to grant a patent. Another concern that has been raised, especially about indigenous peoples' traditional knowledge, is that the intellectual property system does not provide sufficient opportunities for the communities to protect it from use by others. Of course, to some extent, the existing intellectual property system can help in this regard through its various fields, including the rights of authors and performers, trademarks, including certification marks, geographical indications, industrial designs, patents and trade secrets. Debate has begun as to whether the existing intellectual property system should be complemented with forms of protection more specifically directed to traditional knowledge, especially of indigenous and local communities.

13. A related topic is IP and biodiversity, in particular the relationship between the TRIPS Agreement and provisions on these matters of the Convention on Biological Diversity (CBD). The TRIPS Agreement, which deals with intellectual property, is silent on the issues addressed in the CBD of the rights of countries to regulate access to biological resources in their territories on the basis of the principle of prior informed consent and of arrangements for benefit sharing. This silence means that the TRIPS Agreement leaves Governments free to legislate in accordance with the requirements of the CBD on these matters.

## III. REPLIES RECEIVED FROM NON-GOVERNMENTAL ORGANIZATIONS

### A. Center for International Environmental Law

1. The Center for International Environmental Law (CIEL) has maintained a focus on intellectual property rights for a number of years. CIEL is concerned that the current international intellectual property rights regime may impact upon food security, health, development and the conservation of biological diversity, and so may undermine fundamental human rights.

2. The response of CIEL notes that as the shift to a "knowledge economy" continues, the definition of ownership and control of information becomes one of the most important policy issues facing societies. The primary justification for granting limited property rights in the form of IPRs is that they grant benefits to society by promoting innovation, creation and consumer protection. IP systems have therefore traditionally sought to strike a delicate balance between awarding private property rights to reward innovation with promoting access to the product and promoting the public interest. Increasingly, however, the balance between private and public interest is shifting. As ownership of knowledge is becoming a key determinant in defining the "haves" and "have-nots" in modern society, powerful interest groups have stepped up pressure on Governments to implement stronger international protection and enforcement of IPRs. Some groups, in particular segments of industry, have attempted to give added - and unjustifiable - force to IPRs by promoting them as natural rights without limitation; in other words, rights that have a moral force that somehow is beyond political challenge. The arguments advanced to support this position assume that a right granted over technology in one State somehow equates with a right of universal coverage. Yet, this development denies the contingent nature of IPRs - Governments may, in the interests of their citizens, choose not to grant IPRs, or to define them more narrowly. It also runs counter to a basic premise of IP systems: any increase in the strength of IPR protection should be clearly justified by associated gains in public welfare.

3. This shift in the balance between public and private interests takes on a new dimension when viewed in the international context. Developed countries - which are traditionally home to the owners of formal technology - have tended to promote IPRs as beneficial to development. At times, developing countries, by contrast - which are generally users, but not producers, of formal technology - have criticized IPRs, arguing that they raise prices and restrict access to the new technologies needed for sustainable human development. Despite bitter disputes between developed and developing countries during the Uruguay Round of trade negotiations, minimum standards for the protection and enforcement of IPRs were inserted on the international trade agenda in the form of the TRIPS Agreement.

4. As a direct result of the TRIPS Agreement, the shift in favour of IPRs-producing companies and countries has accelerated. WTO members are now obliged to introduce IP standards that in many cases increase the *scope* of IPR coverage by, for example, removing exceptions for categories of products such as pharmaceuticals; increase the *duration* of coverage; and increase the *geographical coverage* of IPRs. Members have agreed to implement IP systems that are costly and that are geared towards industrial development, but that fail to protect innovators that are knowledge rich but economically poor. Concern has also been expressed that

the TRIPS Agreement sits uneasily with the other agreements of the WTO; while the agreements on goods and services strive for trade liberalization, the TRIPS Agreement promotes intervention in the market to protect private property rights.

5. CIEL believes that, while IP protection can have positive impacts, the implementation of the TRIPS Agreement could affect negatively several matters including developing country innovation; the transfer of technology to developing countries; the transfer of technology under multilateral environmental agreements; health care and access to essential medicines; the protection of the knowledge, innovations and practices of indigenous and local communities; and the operation of certain aspects of the Convention on Biological Diversity.

6. As a first step towards resolving the complex issues raised in the TRIPS Agreement, CIEL recommends: (i) a full and public discussion by WTO members, in partnership with relevant international organizations and civil society, of the public interest issues raised by the evolving international intellectual property regime; and (ii) a systematic "sustainability review" by WTO members in the TRIPS Council of the implications of implementing the Agreement for the public interest and sustainable development, as part of the mandated review of the TRIPS Agreement.

### B. European Writers' Congress

1. The European Writers' Congress applauds the affirmation of the Sub-Commission that the right to protection of moral and material interests of authors is a human right. It considers that: (i) in general, there must be a balance between the interests of individual authors and the interests of society at large; (ii) all individual creative authors should be treated equally, whatever their race, religion, or cultural, social or economic background; (iii) rights to the creative productions of indigenous communities should be respected; (iv) intellectual property rights cover a wide field of productions, some of them of an artistic nature resulting from the author's own intellectual creation and others from investment of skill, expertise or resources in industrial or commercial productions and, consequently, the respective interests in such rights are not the same in all cases; (v) the balance of the interests of individual creative authors and the interests of the society at large should be judged separately from the balancing of the interests of owners of other intellectual property rights such as patents or rights in biological productions; (vi) the provisions of the TRIPS Agreement concerning the protection of IPRs should be the subject of separate analysis and adjudication in assessing the balance between the interest of owners of these rights and the interests of the public.

2. The European Writers' Congress urges the Secretary-General to: (i) draw attention to the fact that the existence of all cultural material consisting of literary, dramatic, musical and artistic works depends upon the creations of individual authors and that the protection and sustaining of authors' rights to the greatest degree possible is therefore the major priority for the preservation and development of the cultural heritage of mankind; (ii) indicate that the Congress believes that, in serving humanity, authors should contribute to all means of ensuring the wider public dissemination and availability of their works, but that any exceptions in this area should be assessed separately from those applying to other IPRs and should be confined to certain special cases which do not conflict with the normal exploitation of the authors' works and do not unreasonably prejudice their legitimate interest.

## C. German Commission of Justice and Peace

1. The German Justice and Peace Commission is analysing the negative impact of the TRIPS Agreement on the human rights to adequate food, health, and the right of peoples to freely dispose of their natural wealth and resources and not to be deprived of their own means of subsistence. The response notes that it is difficult to predict accurately the full dimensions of the effects that will result from the implementation of the TRIPS Agreement. However, the impending risks are already obvious. In addition, some developing countries are currently experiencing political pressure which involves the implementation of regulations that go beyond the TRIPS Agreement.

2. In relation to the right to adequate food, the German Justice and Peace Commission notes that according to General Comment No. 12 of the Committee on Economic, Social and Cultural Rights, the right to adequate food requires that States "ensure that enterprises or individuals do not deprive individuals of their access to adequate food". The Commission believes that the regulations concerning plant varieties provided by the TRIPS Agreement will cause considerable shifts in the seed market. The farming system of the poor rural population in the developing countries works to a large extent according to the principle of subsistence. These people are dependent on the access to means of production and seeds. They have been cultivating their seeds over centuries and exchanged them between their communities. This forms the basis for selective cultivation of positive properties. Local plant varieties have adapted themselves to the local conditions. They are highly resistant to plant diseases and climatic conditions. At least a minimum yield is guaranteed even under difficult conditions. Traditionally, the farmers have the right to retain a portion of the harvested seeds, to preserve, to refine, to use, to share, to exchange and to sell them. This is known as the farmers' right. While the TRIPS Agreement is being implemented, international seed corporations provide farmers with free supplies of seeds, which are protected by patents, and buy up local seed companies. This is happening in India. The consequences are predictable. In a few years, the farmers in the rural areas will be dependent on the patented seeds, because soon they will no longer have their own seeds and local seeds will no longer be available. Additionally, there is a risk that the number of plant varieties will decrease as a consequence of the concentration of the market. The variety of the nutritional basis will be irreversibly limited. It is obvious that the foreseeable price increase of seeds will seriously restrict the right to adequate food of those farmers who now already live at subsistence level.

3. The German Justice and Peace Commission also believes that the right to health will be affected negatively by the implementation of the TRIPS Agreement. The Commission notes that the TRIPS Agreement obliges all WTO members to provide for patents of 20-year duration in all areas of technology, including for pharmaceuticals. Developing countries are increasingly obliged to pay royalties for the use of pharmaceuticals which have been developed on the basis of their biological resources. Those who favour the TRIPS Agreement argue that only a strong regime of patent protection can motivate the pharmaceutical industry to make the high investments necessary for the development of new drugs. At the same time, it is obvious that commercial organizations do not invest in innovative and costly research projects focused primarily on the needs of the poor, because their purchasing power is very low. Patent protection in the field of pharmaceuticals will not favour the development of drugs that are mainly directed towards the needs of the poor. The cost-efficient development of drugs and the extension of public research would, however, be in the interests of the poor. In cases of national

emergency, article 31 of the TRIPS Agreement allows the use of the subject matter of a patent without the right holder giving his consent. But the recent example of pressure against South African legislation in the field of HIV/AIDS treatments shows that clarification is urgently needed. The Commission also notes that pharmaceuticals of vital necessity will get more expensive when they are subject to patent protection. As a consequence, the enjoyment of the right to health will be restricted.

4. Finally, the Commission notes that the TRIPS Agreement could reduce the right of peoples to freely dispose of their natural wealth and resources. The Commission notes article 27 of the TRIPS Agreement, which states that "... patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial applications. Patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced". These obligations must be considered in connection with the basic WTO principles of national treatment (nationals and foreigners must enjoy equal treatment) and most favoured national treatment (any advantage granted by a member to the nationals of any other country shall be accorded to the nationals of all other members). This means that each country is obliged to allow the patenting of its own biological resources by foreigners. Thus, for example, in some cases, the countries of origin of genetic resources are obliged to provide patent protection even if a foreign company appropriated unlawfully the resource on which it bases the development of products or processes. These requirements in the TRIPS Agreement are not only contrary to human rights but also to the regulations of the Convention on Biological Diversity (CBD) and the International Undertaking of the Food and Agriculture Organization.

5. According to the Commission, the regulations of the CBD and the International Undertaking of the FAO are in accordance with the human right of all peoples to dispose freely of their natural wealth and resources. Consequently, they should be integrated into the TRIPS Agreement. Under them, prior informed consent for the use of genetic resources of a country is required. A company requesting a patent should give evidence of the prior informed consent of the country of origin as well as evidence of a fair and equitable benefit-sharing with that country or the community or individuals concerned. Unlawful appropriation of genetic resources by foreign individuals or companies must not be legitimized.

### D. Greenpeace

1. The response of Greenpeace included a series of commentaries concerning "A patent on breeding human beings", "Patents on Life granted by the European Patent Office" and "Zoo Animals, Racehorses and People: Patents on life - a documentation of applications submitted to the European Patent Office 1999-2000". The main focus of the Greenpeace response is the European Union's Patent Directive which is currently being implemented into national legislation in Europe. According to Greenpeace, the EU Patent Directive would explicitly legalize the controversial practice of the European Patent Office of granting "patents on life". In particular, while normally patents can be granted only for inventions, not discoveries, the Directive will allow the patenting of isolated human genes - which effectively amounts only to a

discovery. This will mean that human body parts, including complete organs, mammals and large parts of living nature are to be declared the intellectual property of patent holders. Claiming extremely wide-ranging intellectual property rights over parts of living nature is becoming part of the strategy to privatize previously common goods.

2. According to Greenpeace, industry and the European Patent Office drew up the EU Directive. In addition, the genetic engineering industry exerted massive influence over the debate in the European Parliament. In order to show the extent to which industry is claiming patents on life, Greenpeace, with the support of the organization No patents on Life, carried out two years of research at the European Patent Office. More than 1,000 applications for patents from the years 1999 and 2000 were studied in detail and sorted by category. The research produced several results:

(a) There was a remarkable increase in the number of patent applications aimed specifically at human beings. Some of these patent applications prove more clearly than any other publication the extent to which the industry plans to use human beings as a new commercially exploitable source of raw material;

(b) The number of patent applications for genes is increasing dramatically and in some cases several hundred human gene sequences are claimed at once;

(c) There is a systematic extension of patents claimed in the area of food production. Today patent applications concern not only the wheat grain for sowing but also the flour made from it for baking bread;

(d) New developments comprise patent applications for non-genetically modified foodstuffs.

3. Greenpeace includes the following examples of applications for patents over life (the application numbers are included in brackets): the breeding of human embryos (WO 00/27995); a process for cloning female egg cells of zoo animals, racehorses and people before they are fertilized (WO 00/01806); artificial fertilization combined with gender determination (WO 99/33956); a procedure for testing non-genetically modified seed and the food produced from it (WO 00/48454); golden rice - rice grains with an increased Pro-vitamin A content (WO 00/53768); flour for baking bread (WO 00/29591); a claim over plants, seeds and crops with possible health-promoting ingredients and the corresponding genes, which would include the processing of the crops into food and the processed products such as sauces, ketchup or soup (WO 00/04175); over 100 gene sequences from human ovary tissue (WO 99/51727); a claim for patent protection for more than 1,000 gene sequences in a pathogen causing meningitis (WO 99/22430).

4. According to Greenpeace, following the patenting of plants, cells and organs, intervention in the genome of the human germ line has now also been patented. This breaks a taboo and abuses human dignity in an unprecedented way.

5. Greenpeace demands the following:

(a) No patents must be granted on human genes, cells, tissues, organs, or whole people; parts of people must not be degraded to commercial products; there must be no right to claim ownership of people;

(b) Life - including plants and animals - is not an invention of the gene industry and for this reason must not be patented on principle: genetic corporations must not be allowed to claim ownership rights to our common natural heritage and biological diversity;

(c) The manipulation of humans and animals must not be turned into a business;

(d) The member States of the European Patent Convention must exercise their political control and prevent the European Patent Office from granting further patents in these areas;

(e) The EU Directive on patenting biotechnological inventions should not be transposed into national law;

(f) The EU must initiate a new European patent law which prohibits the patenting of living organisms and their genes;

(g) The EU Directive should be renegotiated without delay.

### E. International Association of Audio-Visual Writers*

1. The International Association of Audio-Visual Writers raised a number of issues in their response. First, they noted that the moral interests of authors, referred to in article 27 of the Universal Declaration on Human Rights, are also referred to in article 6 bis of the Berne Convention for the Protection of Literary and Artistic Works, paragraph 9 of which states: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation". However, the Association notes that the strength of the protection of the moral rights of authors varies drastically from State to State.

2. The Association also notes differences of approach in the protection of authors' rights found in many civil law countries - and copyright protection - which comes from the common law. Copyright is not concerned with the interests of authors, but with the protection of works. With the object of protection being the work, protection can only be guaranteed if the work is fixed in some form. Thus, copyright law has come to an impasse with the advent of the Internet, due to the difficulty of fixing works in virtual reality. The Association also notes that the copyright system is both complex and costly, and at times inefficient. In sum, copyright protection ignores its very justification, namely the creation itself, considerably reinforces the rights of producers as opposed to authors, and confers the same prerogatives on the producer that

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* Original French.

an author has with regard to users. The continental system of authors' rights, on the other hand, permits the creator of audio-visual works a level of control that is necessary to ensure their free circulation.

3. The economic utility of copyright is identical to that of authors' rights, but while authors' rights are based on the notion of respect for the creation, copyright, which is a legal fiction, regards the producer or the production company as the sole author. The Association poses the question why copyright - which negates the link between author and work - should favour the music or film industry any more than do authors' rights (which do not negate this fundamental link).

4. Moral rights, such as those included in the continental system of protection of authors' rights, contribute to the conservation of cultural heritage. With many production companies disappearing, it is often the authors who ensure that films and other creations are preserved. The public also has an interest in ensuring that artistic creations are not damaged or destroyed. There is also the question of freedom of expression. The two rights are complementary and should be protected with equal force. Moral rights should be introduced into all IP systems and respected as inalienable rights.

### F. International Federation of Musicians*

The response of the International Federation of Musicians notes that the relationship between IPRs and human rights is crucial, in particular given the emergence of new audio-visual technology at a time of globalization. The Federation notes five matters which should be considered under the present question. First, authors' rights should not be confused with IPRs that protect investments such as producers' rights, patents on medicines, trademarks, etc. Second, there has been a strong concentration of capital and commercial alliances (AOL-Warner, Vivendi-Universal-Canal Plus, Nbapster-Bertelsman, etc.) that operate particularly aggressive strategies with regard to their IPRs. Third, those who uphold the right to access information in order to gain exceptions to IPRs are serving, either directly or indirectly, the interests of the new media (Internet servers, television operators and so on), taking advantage of the confusion between information and protected creations. Fourth, article 27 of the Universal Declaration of Human Rights is constantly being violated with respect to interpretive artists in both developed and developing countries. In particular, the Federation draws attention to the failure of the last WIPO Diplomatic Conference in December 2000 to adopt an international instrument creating international norms of protection for such artists in the audio-visual domain.

### G. International Publishers Association

1. IPA respectfully questions the existence of alleged actual or potential conflicts between the implementation of the TRIPS Agreement and the realization of other economic, social and cultural human rights, noted in resolution 2000/7. In particular, IPA contests the existence of such conflicts in the context of copyright protection.

2. The TRIPS Agreement in substance incorporates the Berne Convention for the Protection of Literary and Artistic Works. Both the Berne Convention and the TRIPS Agreement reflect a

balance of intellectual property rights and other human rights. As a consequence, this balance is already to a large extent incorporated within national copyright laws and can be incorporated in legislation implementing the TRIPS Agreement.

3. Consequently, the International Publishers Association makes the following recommendations. It respectfully calls on the United Nations Economic and Social Council, the World Trade Organization, the Special Rapporteurs on globalization and its impact on the full enjoyment of human rights, the United Nations High Commissioner for Human Rights, the Committee on Economic, Social and Cultural Rights, the World Intellectual Property Organization, any other competent international governmental organization and their member States:

(a) To provide wider recognition of the balance between intellectual property rights and other human rights as already enshrined in international treaties, in particular article 9 of the Berne Convention, article 13 of the TRIPS Agreement and article 10 of the WIPO Copyright Treaty;

(b) To note the differences between the relation of industrial property rights and other human rights, on one hand, and the relation between copyright and other human rights, on the other hand;

(c) To take any appropriate action to foster and to prevent actions which would impede or delay the prompt and effective implementation of the TRIPS Agreement, in particular as it relates to setting international standards for the protection and enforcement of copyright;

(d) To foster national efforts and international cooperation to supplement economic and social policies in the fields of education, science and culture.

### H. Max Planck Institute

1. The Max Plank Institute stated that resolution 2000/7 gave the impression that a conflict exists between intellectual property rights and human rights. In particular, the wording of paragraph 11 seems to imply that intellectual property rights are not themselves human rights; however, the Max Planck Institute believes that at least the main kinds of intellectual property rights are human rights.

2. The relationship between intellectual property rights and other human rights is one of balance rather than conflict. The various human rights do and must complement each other. In this respect, the following remarks seem essential. Intellectual property rights have always been characterized by the search for the proper balance between authors' and inventors' rights and the public interest; for example, in the field of copyright, exclusive rights are limited in favour of the public interest, and the exercise of finding the right balance by determining the limitations of and exceptions to exclusive rights has been part of all copyright legislation since their very beginnings. The same is true for the setting of the term of protection, which is limited in time, as opposed to the duration of property rights over material objects. In addition, not all creative efforts are protected by copyright; in particular, ideas, methods, style, or mere information or news of the day are exempt.

3. Another aspect of the complementarity of intellectual property and other human rights which must not be forgotten is that exclusive rights of authors and inventors themselves have even been justified by the public interest, as may be seen from the United States Constitution of 1787 according to which the progress of science and useful arts shall be promoted "by securing for authors and inventors for limited times the exclusive right to their respective writings and discoveries". In continental law countries, authors' and inventors' rights have been justified by the philosophy of natural law, following from the idea that the results of their work are the natural property of authors and inventors.

4. Another aspect which seems essential in evaluating the relationship between intellectual property and other human rights is the fact that it is only the author's recognized exclusive rights which allow him/her to make a living from the exploitation of his/her creations. Equally, in the field of patents, it is only the recognized exclusive rights of the inventor which allow him/her to invest in research regarding, for example, new pharmaceutical products or medical procedures; without the possibility of amortizing the high cost of such research, no one would undertake to try to find new pharmaceuticals or other products which then may benefit everybody. In other words, without exclusive rights, progress in the area of medicine and other areas of invention would not take place, or at least not with comparable speed and quality. Accordingly, intellectual property promotes and makes possible the progress of science for the benefit of all.

5. Paragraphs 5 and 6 of resolution 2000/7 should be clarified to the extent that they refer to the social function of intellectual property, namely by taking into account that authors need legal protection of their rights as recognized in particular in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights precisely because their social status is usually already quite low and they depend on the possibility of benefiting from the exploitation of their works. Following the 1967 Revision Conference on the Berne Convention held in Stockholm most parliaments of the countries concerned refused to ratify the annex which had been negotiated and which provided far-reaching exceptions to authors' rights in favour of the exploitation of works in developing countries. One of the main reasons for this rejection was that parliaments did not see any justification for making exceptions for developing countries integrating human rights obligations and principles that protect the social function of intellectual property into provisions, practices, etc. also means that the protection of authors' rights fulfils a social function, as explained above. The situation for inventors is comparable.

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